Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. 86-390

In The
Supreme Court of the United States
October Term, 1986

MULTIMEDIA, INC.,

Petitioner,

v.

CRAIG HAWKINS, by and through his Guardian ad Litem, Linda Hawkins,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

C. Robert Faucette
Counsel of Record
Faucette, Haselden and Harris, P.A.
188 Alabama Street
Spartanburg, SC 29302
(803) 585-2244

Counsel for Respondent

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or call collect (402) 342-2831

23 pp

QUESTIONS PRESENTED

Petitioner has alleged that there are three questions which warrant writ of certiorari. The alleged questions raised by defendant are:

1. In an action for invasion of privacy, do the First and Fourteenth Amendments to the United States Constitution require that the trial judge determine in the first instance whether the publication was privileged because it involved a matter of public interest?

2. In such an action, do the First and Fourteenth Amendments to the United States Constitution require the plaintiff to prove the absence of public interest and a variant of "actual malice" and to do so by clear and convincing evidence?

3. In such an action, if the general subject of the publication admittedly deals with a matter of public interest, is there a privilege under the First and Fourteenth Amendments to the United States Constitution to identify a participant in a case history used to illustrate the general subject of the publication?

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent, Craig Hawkins, by and through his guardian ad litem, Linda Hawkins, respectfully prays that the petition for a writ of certiorari to review the judgment of the Supreme Court of the state of South Carolina, entered in the above captioned proceeding on March 11, 1986, be denied.

OPINIONS BELOW

The opinion of the South Carolina Supreme Court is reported at 288 S.C. 569, 344 S.E.2d 145. It is reprinted in the appendix to this brief, infra at page 1a. The order of the trial denying petitioner's post trial motions is reprinted in the appendix at page 5a.

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JURISDICTION

The South Carolina Supreme Court entered judgment on March 11, 1986, affirming the trial court's judgment on the verdict for the respondent. On May 13, 1986, the state Supreme Court denied petitioner's petition for rehearing. On September 10, 1986 petitioner filed its petition for writ of certiorari. On October 1, 1986 the clerk of court for the Supreme Court of the United States granted respondent an extension of time up to and including November 9, 1986 in which to file a reply to the petition. The jurisdiction of this court is invoked under 28 U.S.C. 1257 (3).

———o———

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Amend. I:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

———o———

STATEMENT OF THE CASE

This matter arises from the publication by the petitioner, through one of its newspapers, the Greenville News, on March 15, 1981, of an article concerning out of wedlock teenage pregnancies. As a "side-bar" or related article to a general article on the subject, the newspaper printed a story which focused on a case history involving the plaintiff as the father of an illegitimate child. The plaintiff commenced this action by service of summons and complaint on July 7, 1981, in which he alleged invasion of privacy by virtue of public disclosure of private facts.

The case went to trial before a jury, which on May 27, awarded the plaintiff $1,500 actual damages and $25,000 punitive damages. Prior to the jury's verdict the defendant had moved for a directed verdict arguing, inter alia, that the subject of the article in question was a matter of legitimate public interest and therefore was constitutionally privileged. This motion was denied.

Subsequent to the jury's verdict the petitioner renewed its prior motion by way of a motion for judgment notwithstanding the verdict. This motion was also denied. The trial court also denied petitioner's motions for a directed verdict and judgment notwithstanding the verdict, which were also made on the grounds that the plaintiff was required to prove actual malice in an invasion of privacy action.

The petitioners raised these issues, and others, on appeal to the South Carolina Supreme Court. That court, in referring to the prior case of *Meetze v. Associated*

Press, 230 S.C. 330, 95 S.E.2d 606 (1956) indicated that in some cases certain occurrences could, as a matter of law, be found to be of public interest. The court went on to say, however, that such determinations are normally a question of fact to be determined by the jury. They found no error in submitting the issue to the jury. (See infra at page 3a.

The South Carolina Supreme Court did not hold, contrary to what the petitioner has indicated, that the question of public interest is always one for the jury. The court also held, in compliance with existing law, that malice need not be shown in order to prove a cause of action for invasion of privacy. They held malice to be relevant only on the issue of punitive damages.

The court also noted that the petitioner had not properly raised the issue of the burden of proof for punitive damages as required by state procedural rules. The court thereupon affirmed the finding of the trial court and subsequently denied petitioner's petition for rehearing in this matter.

SUMMARY OF ARGUMENT

Petitioner's primary argument is essentially that the trial judge erred in not making a threshold determination on the question of public interest. They argue that the trial judge held that such questions are *solely* for the jury. It is clear from the record that the trial judge implicitly made such a threshold determination and decided that the proof of public interest was not conclusive *as a matter*

of law. The South Carolina Supreme Court properly found that there was a question of fact on this issue and that is was properly submitted to a jury.

As a corollary to its primary argument, petitioner also argues that this court should adopt an absolute rule that the press has a blanket right to illustrate an article on any matter of public interest by focusing on a particular individual. Such an argument would effectively destroy any right of action which an individual might have for public disclosure of private facts.

Petitioner's final argument is that the respondent failed to prove "the absence of public interest and a variant of actual malice and to do so by clear and convincing evidence." Petitioner ignores the fact that actual malice has never been an element of the tort invasion of privacy by public disclosure of private facts, except as to punitive damages. It also ignores the fact, as indicated by the South Carolina Supreme Court, that the petitioner failed to comply with state procedural requirements with regard to raising the issue of the standard proof of actual malice in order to recover punitive damages.

ARGUMENT

I. The trial court implicitly considered the issue of whether the subject matter of this action was privileged as being a matter of legitimate public interest in the passing on petitioner's motion for directed verdict and judgment notwithstanding the verdict.

The record clearly indicates that the trial court on two separate occasions considered the issues of public interest. Though it is not explicitly stated in the trial judge's order that he considered this issue it is obviously implicit from the fact that he denied both of petitioner's motions. Petitioner alleges that both the trial judge and the South Carolina Supreme Court held that such questions of public interest are always jury questions. This is simply not the holding of either the trial judge or the South Carolina Supreme Court. On the contrary, their orders indicate that such questions must be addressed on a case by case basis. Both courts concluded that in this case there was a sufficient conflict in the evidence to submit the matter to a jury. Apparently, the jury also agreed that there was no public interest privilege in this case.

II. The absolute rule which the petitioner advocates with regard to cases of this type would effectively prohibit any actions ever being brought against a newspaper for public disclosure of private facts.

From the cases cited in the appellant's petition, it would appear that the petitioner subscribes to the theory held by some that when a matter is newsworthy or of general public interest, the first amendment right of free

speech allows the media to publicize the persons involvement without fear of civil liability. Under such a theory, the first amendment interest would *always* win out over an individual's privacy interest. Fortunately the courts have not adopted such an approach. *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942); *Virgil v. Time, Inc.* 527 F.2d 1122 (9th Cir. 1975); *Briscoe v. Readers Digest Association*, 4 Cal. 3rd 529, 93 Cal. Rptr. 866, 438 P.2d 34 (1971); *Massachusetts v. Wiseman*, 249 N.E.2d 610 (1969); *Patterson v. Tribune Company*, 146 So.2d 623 (1962); *Feeney v. Young*, 191 App. Div. 501, 181 N.Y.S. 481 (1920); *Melvin v. Reid*, 112 Cal. App. 285, 297 P. 91 (1931).

These cases all stand for the proposition that even if a general subject might be of legitimate public interest, the individuals who are involved with activities covered by that general subject do not necessarily lose all rights of privacy. As indicated by the petitioner in its brief there are other cases which indicate that a person involved in matters of legitimate public interest had lost their right to privacy from the disclosure of private facts. The important thing to recognize is that these cases do not stand for the blanket rule which petitioner advocates but rather are limited exclusively to their facts. The courts across the country have addressed such cases on a case by case basis and should continue to do so. Contrary to what it indicates in its brief, petitioner does indeed appear to be seeking a shelter for irresponsible journalism.

III. Adopting a clear and convincing evidence standard of proof would serve no other purpose than to limit the rights of privacy of individuals.

Petitioner asks this court to adopt a clear and convincing evidence standard of proof in such invasion of privacy cases. It argues by analogy that such proof is required in libel and slander cases and should therefore be required in invasion of privacy cases. Petitioner fails to recognize that the tort of invasion of privacy is, by its very nature, a less malicious tort than libel or slander, and therefore should not require as great a degree of proof. It has long been held that such matters should be left to the states to formulate their own proof requirements. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1979). Cases like the present one require a great deal of balancing of competing interests. To require proof by clear and convincing evidence would tilt the balance in the favor of the media in all such cases.

For the foregoing reasons, the court should deny the petition for writ of certiorari to the Supreme Court of the State to South Carolina.

Respectfully submitted,

C. Robert Faucette
Counsel of Record
Faucette, Haselden
and Harris, P.A.
188 Alabama Street
Spartanburg, SC 29302
(803) 585-2244

Counsel for Respondent

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APPENDIX

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CRAIG HAWKINS, by and through his Guardian ad Litem, Linda Hawkins,

Respondent.

vs.

MULTIMEDIA, INC.,

Appellant.

Appeal from Spartanburg County
Jonathan Z. McKown, Judge

Opinion No. 22496

Heard November 19, 1985—Filed March 11, 1986

AFFIRMED

David L. Freeman and Carl F. Muller, both of Wyche, Burgess, Freeman & Parham, of Greenville, for Appellant.

C. Robert Faucette and Terry Haselden, both of Faucette and Rudasill, of Spartanburg, for Respondent.

NESS, C.J.: This is an action by a minor child, respondent Craig Hawkins, against appellant Multimedia for invasion of privacy. Craig obtained a verdict against Multimedia for $1,500 actual damages and $25,000 punitive damages. We affirm.

Multimedia published a story in its newspaper concerning the problem of teenage pregnancies. A side-bar article identified Craig as the teenage father of an illegiti-

mate child. The majority of the article focused on the unmarried teenage mother.

The teenage mother told Multimedia's reporter that Craig was the father of her child. The reporter called Craig's home, identified herself to Craig's mother and engaged her in conversation. She reached Craig in a later telephone call, identified herself and asked him questions. Craig was reluctant to answer questions and terminated the conversations in three or four minutes. In neither call did the reporter request permission to identify or quote Craig.

The trial judge charged the jury, over Multimedia's objection, that a minor cannot consent to an invasion of his privacy. Multimedia asserts this was error. We find it unnecessary to reach this issue. Invasion of privacy is a cause of action sounding in tort. *Rycroft v. Gaddy*, 281 S.C. 119, 314 S.E.2d 39 (S.C. App. 1984). A defendant may avoid liability for invasion of privacy by showing the injured party consented to the publication of facts about his private life. 62 Am. Jur. 2d, Privacy, Section 18. Since consent is a matter to be raised by the defendant, it has the burden of proof on that issue. See, *O'Neal v. Carolina Farm Supply of Johnston*, 279 S.C. 490, 309 S.E.2d 776 (S.C. App. 1983). Consent may be found where the evidence shows a voluntary agreement to do something proposed by another, and the party consenting possesses sufficient information and ability to make an intelligent choice. 15A CJS, Consent, pp. 573-577.

Multimedia failed to introduce any evidence of Craig's consent. While Craig did not terminate the conversation immediately, it was brief and he was "very shy." The

reporter never asked Craig if she could use his name in a newspaper article. Craig understood the newspaper was doing a "survey" on teenage pregnancy, and he was never told he would be identified in an article. Since there was no evidence of Craig's consent, we need not decide the standard by which a minor's consent is to be determined.

Multimedia next asserts the trial judge erred in not directing a verdict in its favor because the matter reported was of general interest. The right of privacy does not prohibit the publication of matters which is of legitimate public or general interest. Public or general interest does not mean mere curiosity, and *newsworthiness is not necessarily the test. Meetze v. Associated Press,* 230 S.C. 330, 95 S.E.2d 606 (1956). See also, *Rycroft v. Gaddy,* supra. We held in *Meetze,* supra, that a twelve-year-old girl giving birth to a child was "biological occurrence which would naturally excite public interest." Id. at 610. Ordinarily, however, whether a fact is a matter of public interest is a question of fact to be decided by the jury. We find no error in submitting this issue to the jury.

Multimedia also asserts error in the refusal of the trial judge to charge that malice must be shown by clear and convincing evidence. Malice need not be shown to recover for invasion of privacy. 62 Am. Jur. 2d, Privacy, Section 15. Malice is relevant only when the plaintiff is seeking punitive damages. Id. Section 47. The issue of the burden of proof for punitive damages was not raised at trial and may not be raised for the first time on appeal. *Hubbs v. Government Employees Insurance Company,* Op. No. 22442 (filed January 13, 1986).

Multimedia's remaining exceptions are without merit and are affirmed pursuant to Supreme Court Rule 23.

AFFIRMED.

GREGORY, HARWELL, CHANDLER and FINNEY, JJ., concur.

COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

C.A. No. 81-CP-1275-2

LINDA HAWKINS and CRAIG HAWKINS, by and through his Guardian ad Litem, LINDA HAWKINS,

Plaintiffs,

—vs—

MULTIMEDIA, INC.,

Defendant.

ORDER

These matters come before me through the post trial motions of the plaintiff, Linda Hawkins, and defendant in this case. At trial, the jury awarded the plaintiff Craig Hawkins, $1,500 actual damages and $25,000 punitive damages. In the case of the plaintiff, Linda Hawkins, the jury refused to award any damages.

At the conclusion of the trial, the defendant moved for judgement notwithstanding the verdict, and in the alternative for a new trial absolute or a reduction of the verdict as to punitive damages subject to a new trial nisi. Plaintiff Linda Hawkins moved for a new trial additur in her case. Counsel for both plaintiff and defendant have submitted briefs in support of their motions to aid the court in its determination of these matters.

Defendant's motion for judgment notwithstanding the verdict in the case of Craig Hawkins is denied. The defendant asserted that the published matter was true,

of general interest, had previously been made public, and that actual malice on the part of the defendant was not proven. However, truth is no defense to an action for invasion of privacy. *Meetze v. Associated Press,* 230 S.C. 303, 96 S.E. 2d 606 (1956). Actual malice is not a requisite element of the tort of invasion of privacy. *Middlebrooks v. Curtis Publishing Company,* 281 F. Supp. 1 (D.S.C. 1968). The defendant's allegations of general interest and prior publicity are questions of fact upon which conflicting evidence was presented to the jury. The jury's verdict is supported by strong evidence which indicates that the published matter was not of general interest and had not been previously published to the entire community.

The defendant's motion for a reduction of the verdict is also denied. The argument by the defendant that the punitive damages must be reduced due to their disproportionality to actual damages is not supported by law. Our court has repeatedly held that punitive damages need not be proportionate to the actual damages. *Thompson v. Home Security Life Insurance,* 271 S.C. 54, 244 S.E.2d 533 (1978); *Hicks v. Herring,* 246 S.C. 429, 144 S.E.2d 151 (1965); *Charles v. Texas Co., et al,* 199 S.C. 156, 18 S.E.2d 719 (1942). The case of *Campus Sportswear v. M.B. Kahn Construction Co.,* 515 F. Supp. 64 aff'd 644 F.2d 877 (4th Cir. 1981) explains the factors to be considered in determining punitive damages:

> The admonitory function of punitive damages does not lend itself to formulation. For one thing, a survey of South Carolina cases indicates that there has never been an agreement on ratios. There is no definite mathematical rule as to the proportion that that

> (sic) punitive should bear to actual damages . . . . One must look to behavior, not to results, to determine the need to admonish and one must look to the wealth of the defendant to determine the amount which must be awarded to accomplish that result. 515 F. Supp., at 106

This court finds that the confidential matter of the published information, the defendant's status as a youthful private individual, the recklessness involved of the defendant's publication, and the magnitude of the defendant's wealth are all factors which justify the punitive damages award.

The defendant's assertion that a new trial should be granted on the basis that this court's refusal to instruct actual malice as an element of invasion of privacy is without merit. Our court has held that actual malice need not be proven in order to establish liability from an invasion of privacy. *Middlebrooks*, supra. While some United States Supreme Court authorities support the contention that malice is required as an element of proof in order to establish a cause of action, these cases are all defamation and defamatory false light invasion of privacy cases. The present case alleges no defamation. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1979), the U.S. Supreme Court held that actual malice is not an element of an invasion of privacy action involving a private citizen. The state interest in compensating injury to private citizens was held to require application of a different rule from that of public figures. The *Gertz* case, supra, held:

> States should retain latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to

> the reputation of a private individual. . . and so long as they do not impose liability without fault the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. 94 S.Ct., at 3010.

The defendant also asserts that this court improperly charged the jury when it charged that a minor could not give his own consent to allege to (sic) invasion of his privacy. *Dixon v. U.S.*, 197 F. Supp. 798 (D.S.C. 1962) held that:

> In the absence of bad faith, the doctrine of waiver or consent does not apply to a minor, nor can he consent to the violation of his rights, and his rights cannot be waived by persons not authorized by law (to) do so. 197 F. Supp. at 803

This court designed its jury instruction on consent in accordance with the holding in *Dixon,* supra. Therefore, its instructions were proper. Although the recent holding in *T.Z. Standard v. Shine,* Opinion No. 21792 (S.C. Sup. Ct. Sept. 20, 1982) held that a minor may be found negligent if his behavior does not meet a standard to be expected of a child of like age, experience, and intelligence, the *Shine* case does not address the issue of consent. The doctrine of negligence is not at issue in this case.

Plaintiff Linda Hawkins' post trial motion for a new trial additur is denied. Plaintiff Linda Hawkins asserts that the jury found for her as to liability yet awarded neither actual damages nor nominal damages. The verdict form returned by the jury in this case read as follows:

> We find for the Plaintiff Linda Hawkins in the amount of 0 dollars actual damages and 0 dollars punitive damages.

At first glance, this appears to support the plaintiff's allegation, however, the verdict form provided to the jury failed to leave a space for the jury to find for the defendant in the case of Linda Hawkins by herself. Therefore, the jury's finding of no actual damages and no punitive damages was actually a finding for the defendant in this matter. The jury verdict in favor of the defendant in the case of plaintiff Linda Hawkins could have been based upon evidence in the record that her privacy was not invaded. Therefore, the plaintiff Linda Hawkins' motion for a new trial additur is denied.

WHEREFORE, all of the plaintiff's and the defendant's post trial motions in the above captioned case are denied and the verdict of the jury is upheld.

IT IS SO ORDERED.

/s/ Jonathan Z. McKown
Presiding Judge of the
7th Judicial Circuit

Dec. 11, 1983

Gaffney, SC